United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2090

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RICHARD E. KASPEREK,
Petitioner-Appellant,

vs.

DONALD RUMSFELD, Secretary of Defense,
and
COMMANDANT, U. S. MARINE CORPS., *et al.*,
Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR RESPONDENTS-APPELLEES

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BRIEF FOR RESPONDENTS-APPELLEES

Preliminary Statement

On May 17, 1976 Judge John T. Curtin signed an order to show cause and temporary restraining order, restraining the United States of America and the United States Marine Corps from returning petitioner Richard E. Kasperek from the Western District of New York. Petitioner had filed a "Petition for a *Habeas Corpus*/Complaint for Declaratory Judgment and

Injunction" alleging that he had been fraudulently induced to enlist in the Marine Corps, asking the District Court to release him from his military obligations.

The government opposed the District Court's jurisdiction to hear such a complaint, and following briefs and oral argument on this limited issue Judge Curtin set the matter down for a hearing on the merits, declining to rule on the government's motion to dismiss (App. P. 53).

On July 15 and 16, 1976 a trial was held before Judge Curtin on Kasperek's substantive claim; following this Judge Curtin orally ruled that petitioner Kasperek failed with his burden of showing that there was any misunderstanding between Kasperek and the Marine Corps which would justify setting aside his enlistment contract, and thus dismissed Kasperek's petition and complaint, ordering Kasperek to return to the Marine Corps (Surrender of Kasperek was stayed, on his motion, pending outcome of this appeal).

Petitioner Kasperek now appeals the District Court's decision.

Issues

1. Jurisdiction of the District Court to hear Petitioner Kasperek's complaint.

2. Whether Kasperek is entitled to relief from his enlistment contract.

Statement of Facts

In early September, 1974 Richard E. Kasperek, approaching his eighteenth birthday, entertained thoughts of enlisting in the U.S. Marine Corps. Kasperek had quit high school before graduating, and at this time was working at the

Buffalo Raceway at a job he was not particularly happy with; it was the prospect of a better job and a chance to finish high school that was a motivating factor for Kasparek to consider enlistment (App. P. 107, 112).

Kasperek made initial contact with a Marine recruiter, in the Buffalo suburb of Hamburg, N.Y. Sergeant Koponen, and received literature and had discussions with the Sergeant concerning occupational fileds available to an enlistee. Following certain mental and physical screening tests, Kasperek continued to maintain contact with the recruiter, many times accompanied by a long-time school friend, Edwin Palczewski (App. P. 109-110). Following his original meeting with the recruiter, Kasperek had four to five additional meetings at the Marine office in Hamburg, New York, some lasting as long as one and one-half hours, discussing all aspects of Marine Corps life (App. 109, 113), including the types of jobs available, pay, boot camp life, etc.

On March 25, 1975 Kasperek made the decision to enlist in the Marines, and called the recruiter to so advise him. After visiting the recruiting office that same day to fill out certain forms, (App. 197), Kasperek returned the next day, March 26th, to actually enlist. At the recruiter's office he signed an "enlistment contract worksheet" (App. pp. 32, 88, 198) and was then driven to the Marine Corps Office in the Federal Building in Buffalo, where he was given a physical examination and again signed another enlistment contract (App. p. 34) as well as a "statement of understanding" (App. p. 1).

The contract Kasperek signed specifically referred to the fact that he was promised no specific assignment:

> "I have had this contract fully explained to me. I understand it, can certify that no promise of any kind has been made to me concerning assignment to duty,

geographical area, schooling, special programs, assignment of government quarters, or transportation of dependents except as indicated. Ground sub program mechanical and electrical only.

I swear (or affirm) that the foregoing statements have been read to me, that my statements have been correctly recorded and are true in all respects and that I fully understand the conditions under which I am enlisting.

(signed) Richard Edwin Kasperek
(App. p. 34)

The "statement of understanding" was likewise explicit:

"Today I have enlisted in the Marine Corps and have been promised that I will be assigned, after I successfully complete recruit training, to the grounds sub program mechanical/electrical. I understand that everything on this page applies to me.

No. 1. I understand that I will be given a basic military occupational specialty within the following area which I have initialed.

* * * *

(e) (Ground sub program mechanical/electrical). Either utilities, construction, equipment and shore party, armament repair, ammunition and explosive ordnance disposal, operational communications, repair services or motor transport, whichever the Marine Corps decides (Initialed R.E.K.).

No. 2. I also understand that there are many different jobs in this area, that the Marine Corps will decide exactly what job in this area I will get. I understand that there is NO GUARANTEE that I will get the exact job or duty assignment I want.

* * * *

¶8. I understand that I am signing up in the Marine Corps for four (initialed R.E.K.) years, and that I will

have to serve four (initialed R.E.K.) years even if I am taken out of the program for one of the reasons listed in Para. 4.

¶9. Finally, I understand that the recruiter cannot change any of this, that the Marine Corps can promise me only what is on this piece of paper.

(Signed Richard Edwin Kasperek)
(App. pp. 1, 2)

It is important to note that Kasperek, in his own handwriting, inserted the language "ground sub program mechanical and electrical only", and that he specifically initialed on the "statement of understanding" that paragraph relating to the "ground sub program mechanical, electrical," which provided a description of the types of work for which he would become eligible.

At the time of his enlistment, the procedure called for Kasperek to actually report for active duty sometime the following September, and in fact Kasperek did report to boot camp on September 5, 1975.

At the trial, Kasperek testified that from the outset he indicated a desire to go into the "bulk fuel" field, claiming that Sgt. Koponen had repeatedly promised him that he would get this particular military occupational specialty, referred to as an "MOS." (App., pp. 86, 87, 88, 89, 92, 116, 117, 118, 120). Kasperek conceded, however, that his ideas about the nature of the "bulk fuel" specialty arose from conversations he had, not with the recruiter, but with his uncle and cousin (App. p. 120) and that Sgt. Koponen *never* explained what a "bulk fuel" man would do (App. 121).

After completing boot camp at Paris Island in late November, 1975, Kasperek learned that his assignment was for a phase of the mechanical/electrical sub group referred to as

"motor transport" (App. pp. 99, 138), meaning the driving and maintenance of trucks. Kasperek testified that at this time he complained to his Senior Drill Instructor (App. p. 100) who offered no relief except to suggest that Kasperek talk to a career planner at his permanent place of duty.

Given approximately ten days leave before reporting for his permanent assignment at Camp LeJeune, North Carolina, Kasperek returned to his home in Hamburg, New York, and although he admitted he was unhappy with this particular assignment, he did not contact Sgt. Koponen (App. p. 138).

Kasperek then returned to Camp Lejeune, as ordered, and did no substantial work, as a Christmas recess was approaching (App. 139). Again returning to his home for Christmas vacation, Kasperek made no mention of his job dissatisfaction to Sgt. Koponen.

On January 7, 1976, Kasperek returned to Camp Lejeune, although it was not until approximately January 12th that he began any of his motor transport training. On January 16th Kasperek complained to the career planner, but was told nothing could be done to change his "MOS" (App. 142, 143). Coincidentally, this same day, Kasperek appeared in a Marine Corps traffic court for having an unexpired vehicle sticker on his car (App. pp. 142, 143) an incident which he admits angered him (App. p. 144).[1] This same day, completely dissatisfied with the Marine Corps, he and a friend left Camp Lejeune without authorization (App. p. 144). According to Kasperek's testimony, the two planned to leave that day, January 16th, and return on January 20th to pick up their pay checks, a plan which in fact was carried out (App. pp. 146,

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[1] and an incident which Judge Curtin recognized as having an apparent precipitating effect on Kasperek's dissatisfaction and subsequent complaints (App. p. 263).

147). And, in spite of Kasperek's claimed intention to remain at Camp Lejeune on the 20th, after being reprimanded in typically course Marine Corps language, that same day he left the Marine Corps for good, returning to his home in Hamburg, New York.

Later in the Spring, Kasperek was arrested in the Hamburg area on a local narcotics charge, and a Marine Corps detainer was placed against him. However, because of the death of Kasperek's father, the Marines lifted the detainer so that the defendant could be released from State custody. He remained free on bail, pending the State charge, but was contacted by Capt. Miller of the local Marine Corps office and instructed as to his obligations to return to Camp Lejeune. At the request of Kasperek's attorney, Capt. Miller postponed Kasperek's return to Camp Lejuene several times, and ultimately, before Kasperek ever did return to Camp Lejuene, his attorney brought the present action before Judge Curtin, at which time the Court enjoined any further action with respect to him.

POINT I

The District Court did not have jurisdiction to hear Kasperek's complaint.

Kasperek first argues jurisdiction under 28 U.S.C., § 1361, relying principally on *Lovallo v. Froehlke,* 468 F.2d 340 (2d Cir. 1972). In *Lovallo* (accurately described by the Court as a "strange" case) a serviceman had gained a conscientious objector discharge on a *habeas corpus* petition, the Army ordered him released from their custody and control, and the government successfully appealed. The Army subsequently reassigned him to active duty after his enlistment had expired, claiming that the period from the District Court's order until the day of reassignment would be excluded in computing his period of service. The Court of Appeals made it clear that it was accepting jurisdiction to consider the effect of its own mandate and the effect of the Army's order releasing Lovallo from custody. The Court did *not* accept jurisdiction to decide the merits of the serviceman's claim for discharge, as Kasperek asks this Court to do.

Lovallo noted that three elements are generally required for mandamus to issue:

1. A clear right in the plaintiff to the relief sought,

2. A plainly defined and preemptory duty on the part of the defendant to do the act in question and,

3. No other adequate remedy available. 468 F.2d at 343.

Kasperek's contention that there is no other adequate remedy available because without the District Court's intervention he would face A.W.O.L. charges is as speculative as it is irrelevant. It is a serious strain on logic to accept

Kasperek's position that he has "no other remedies" since he might face a (justificable) military sanction for an unauthorized absence.

While Section 1361 mandamus jurisdiction may, under some circumstances, be a proper avenue for action, it is submitted that on the facts of this record there is an insufficient basis for invoking this principle. *Billiteri v. U.S. Board of Parole* (2d Cir. Slip. Op. P. 5285, decided August 30, 1976).

It is also submitted that Kasperek's conclusion that 28 U.S.C. § 1331 jurisdiction is "surely satisfied", since he may be incarcerated in a military prison, is completely unsubstantiated by the record and wholly without merit. Additionally, any question of venue is equally irrelevant, if there is no jurisdiction to begin with.

As a second jurisdictional justification, Kasperek contends that he has standing to bring a *habeas corpus* action in the Western District of New York; the government argues that Kasperek lacks the requisite attributes sufficient to allow a *habeas corpus* action in this District.

Kasperek claims (1) that he was "in custody" in the Western District of New York, and (2) that there was a "custodian" within reach of the Court's process. The government disputes both of these claims.

Kasperek was in the Western District of New York only because he had returned here under his own power after leaving the Marine Corps at Camp Lejeune without permission. While it is true his stay in a local jail was prolonged temporarily due to a Marine Corps detainer (Kasperek's brief, p. 15), this detainer was subsequently lifted and Kasperek remained free (Kasperek's brief, p. 16). It is equally true that the officer in charge of the local Marine Corps Base in Buffalo, Captain Miller, was the person to whom Kasperek

responded regarding instructions on returning to Camp Lejeune. But it is submitted that those contacts are insufficient to form "custody" of Kasperek of the magnitude to warrant *habeas corpus* relief. See *U.S. ex rel. Rowland v. Cleary,* 397 F.Supp. 395 (E.D.Wisc., 1975).

The authority cited by Kasperek is misplaced. *Schonbrun v. Commanding Officer,* 403 F.2d 371 (2d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969) involved a *Reservist,* a situation critically different from a man already on active duty.[2] Additionally, the Court in *Schonbrun* questioned *habeas corpus* jurisdiction for such an action, and found in any event that the Army's action in that case did not warrant judicial interference in the military's exercise of discretion.

In *Rudick v. Laird,* 412 F.2d 16 (2d Cir. 1969), the Court noted that an Army private, awaiting a transfer from one California base to another California base, did not have jurisdiction to bring a *habeas corpus* action in the Southern District of New York, due to the fact that there was no one in the Southern District of New York who had custody of the soldier, *and additionally* that it was "doubtful whether a soldier who was absent without leave can be characterized as within the custody of any officer of the Armed Forces, any more than it can be said that an escaped prisoner is in the custody of his jailor." 412 F.2d at p. 21.

The "minimum contacts" urged on this Court by Kasperek, under *Strait v. Laird, supra,* made sense in that case since petitioner was an unattached, Reserve Army officer, living and going to school in California with only a nominal Commanding Officer in Indiana. But Strait did nothing to un-

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[2] See *Strait v. Laird,* 406 U.S. 341, 1972, pointing out that the reservist lacks the connections to a particular "custodian" that a soldier on active duty necessarily experiences.

dermine the long standing principle of the *habeas corpus* remedy as requiring a *meaningful* contact in the district where relief is sought. It is submitted that, factually, Kasperek's meaningful contacts were at Camp Lejeune, and that, while he may have made a valiant effort to establish contact in the Western District of New York, he cannot, by his own actions, create sufficient "meaningful" contact to justify judicial action.[3]

Kasperek's final jurisdictional contention that he has no administrative remedies which should be exhausted before this Court can hear this case is equally defective.

The only attempts Kasperek made to seek a military solution to his claimed predicament were to (1) complain to his drill instructor near the end of boot camp (App. p. 100) and (2) complain to a career planner at Camp Lejeune, the same day he left the base without authorization (App. pp. 142, 143). Other than this, Kasperek has taken absolutely no steps to present his claim to the Marine Corps or to seek redress through military administrative channels.

The argument that there is no clear process to which Kasperek can turn for administrative remedy is simply false. 10 U.S.C. § 1552 allows for the correction of military records to correct error or injustice, and Kasperek himself admits that "certainly it is at least remotely possible that Kasperek might ultimately prevail before the Board for Correction of Military Records, and be discharged, and this case might then never reach a federal district court." (Kasperek's brief, p.

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[3] Kasperek's contention that a "significant contact" arises in this district due to his recruitment and enlistment in the Western District of New York is clearly without merit. The issue for *habeas corpus* jurisdiction is where a petitioner's contacts are at the time of the requested relief, not where they were when enlistment incurred. To accept this theory would be to grant a *habeas corpus* jurisdiction in the district where any soldier enlisted.

26). Furthermore, 10 U.S.C., § 938 provides Kasperek with an additional potential remedy.

The Courts have consistently considered the availability of such remedies when passing on the jurisdictional aspects of *habeas corpus* actions. See; *e.g., Schlesinger v. Councilman,* 420 U.S. 738, 1975; *Bard v. Seamans,* 507 F.2d 765 (10th Cir. 1974) and *Champagne v. Schlessinger,* 506 F.2d 979 (7th Cir. 1974).

Kasperek raises a blurred distinction of this authority with his situation, claiming that in his case to proceed administratively would cause "considerable hardship and trauma" (Kasperek's Brief, p. 27), and implying that his case is some type of "emergency", (Kasperek's Brief, p. 28).

Kasperek's overall position on exhaustion is deceptively paradoxical: He argues that the District Court had jurisdiction to reach a decision (that Kasperek *was* lawfully in the Marines), since no exhaustion of remedies was required due to the fact that Kasperek is *not* lawfully in the Marines and the exhaustion doctrine applies only to those "within the Military". Obviously, Judge Curtin's decision on the "merits" of the case has a spillover effect on the jurisdictional issues. See, *e.g., Billiteri v. U.S. Board of Parole, supra,* at p. 5304, citing in Fn. 6 *Lovallo v. Froehlke.*

POINT II

Judge Curtin's decision that Kasperek's contract with the Marine Corps should not be set aside was valid and consistent with the evidence developed at trial; the decision should not now be disturbed by this Court.

Putting aside the issue of jurisdiction, the government submits that the record on Kasperek's substantive claim, as a whole, clearly supports Judge Curtin's decision. Kasperek's brief raises the claim that two documentary exhibits [specifically the "Statement of Understanding" (App. p. 1) and the enlistment booklet (App. pp. 3-31)] "unmistakably promise Kasperek that he would be assigned one of the jobs within the 'mechanical/electrical sub program' ", and that this "unmistakable promise" included the chance to be a bulk fuel man. Needless to say, the District Court reached no such unmistakable conclusion.

Kasperek maintained that he never wavered from his demand for a "bulk fuel" MOS and that he (Kasperek) informed the recruiter that he expected it to involve the refueling of jet aircraft. Kasperek also claimed that the recruiter gave repeated assurances that he would indeed be promised the bulk fuel specialty, a claim Judge Curtin simply found to be untrue. On the contrary, Judge Curtin specifically found that the Marine Corps booklet relating to a "bulk fuel" job gave absolutely no indication this specialty had any connection with aviation; and that Sgt. Koponen's would not have allowed an enlistee to be misled, as Kasperek claims happened:

> In looking at the booklet and looking at (the Statement of Understanding), I think there are several points that

should be made. It appears that even a very cursory examination of . . . the booklet, shows that aviation and other specialties are entirely separate; that the only reference to bulk fuel man appears at page 11 under the 'MOS' 1300 category entitled 'construction equipment and shore party', and thereafter describing the works of various other kinds of people. It describes what a bulk fuel man would do, stating that he installs,—this has been read for several times in the evidence and I will not need it again, but it is absolutely clear from reading the description of bulk fuel man that his job is mainly installation and operation of amphibious assault bulk fuel handling systems. Nothing is said there about aviation. I think even a very quick reading of it would indicate to anyone that if it did have anything to do with aviation, it would only be as an occasional and maybe happenstance because of the particular problems which would be involved.

On the other hand, there are many detailed references to aviation in other parts of the booklet. Under 60 and 61, 'aircraft maintenance'; 62, 'avionics'; 65, 'aviation ordnance'; 67, 'air control and aircraft worker'. There is no reference at all here to any kind of 'MOS' described as bulk fuel, so it seems to the Court that viewing the entire situation and considering, and I have heard Sgt. Koponen's testimony, it appears to me that if somebody came in and said to him, 'I am interested in refueling jet aircraft and not doing anything else', that he would point to the aircraft part of the book and certainly there would not be any discussion about bulk fuel under the 1300 category. (App. pp. 255-257)

Additionally, Judge Curtin made the factual finding that the "Statement of Understanding" was a simple, straightforward form which explicitly informed Kasperek that he could be assigned one of several occupations:

This is not a complicated form. There is nothing misleading on the face about it and on the form, it cer-

> tainly appears very clearly that he could be assigned to either utilities, construction, equipment and shore parties, armament repair, ammunition and explosive ordance disposal, operational communications, repair services or motor transport, whichever the Marine Corps decides, and under that category, the Marine Corps assigned Mr. Kasperek to motor transport. (App. p. 258)

Judge Curtin further found that if Kasperek had asked Sgt. Koponen any questions about the duties of a bulk fuel man, as Kasperek claimed he had, it is clear he would have been shown the booklet, revealing that bulk fuel had little or nothing to do with aviation.

> . . . I find that if any questions had been asked of Sgt. Koponen about the duties of a bulk fuel man, that it is clear from reading the book that it has little or nothing to do with aviation.
>
> If there had been any question about aviation that then there would have been a turn to the aviation 'MOS' as included in the book. (App. p. 259)

Kasperek's brief argues that the denial of any "opportunity to be chosen" for bulk fuel was a breach of contract, so effecting its very essence as to defeat the objects of the parties, thus justifying rescission(Kasperek's Brief, pp. 33, 34). In arguing that subjective intent is irrelevant, and that only external expressions of assent can create a contract, Kasperek's argument generously attempts to concede that he may have had a subjective misunderstanding about the exact content of a bulk fuel specialty. In fact, Judge Curtin's decision does not even grant Kasperek the benefit of that probability. It is true that Judge Curtin discusses Kasperek's *claims* of misunderstanding, but the Judge finds otherwise. As support for this, the District Court points out that Kasperek's actions following his assignment to motor transport are wholly inconsistent with his alleged surprise and disappointment (App. p. 260, *et seq.*).

For an enlistment contract of this type to be breached, it was Kasperek's burden to show (1) a false representation of a material fact, and (2) reliance thereon, (3) to his detriment. *United States ex rel. Roman* v. *Schlessinger,* 404 F.Supp. 77, 85 (E.D.N.Y. 1975). Judge Curtin's findings on the record before him properly concluded that Kasperek had failed with respect to all three of these factors.

It is also recognized that *even if* Kasperek could establish some sort of breach of the enlistment contract, recission would not necessarily be the proper remedy:

> Rescission as a remedy does not inexorably follow the establishment of the fraud; more must be shown. One seeking rescission must also show that upon learning of the deception, he acted quickly and decisively to end the relationship. 404 F.Supp. at 86.
>
> * * *
>
> There is yet another reason why the denial of the equitable relief of rescission is appropriate here. There is a complete absence of proof that the training petitioner received in sonar school is not the functional equivalent of the training he would have received as a data systems technician. Petitioner had the burden of proving that injury resulted from a difference in schooling, e.g., that petitioner's prospect of civilian employment was adversely affected by the difference in training. 404 F.Supp. at 87.

Finally, Kasperek's argument avoids the inescapable conclusion that he got exactly what the Marine Corps promised—one of many occupational fields, to be chosen by the Marine Corps. It might perhaps be useful to examine Kasperek's own analogy (Kasperek's Brief, p. 35), in a context more applicable and more realistic to this case: if a produce merchant were to contract for a carload of "fruit—either apples, oranges, limes, lemons, grapes, peaches, or pears,

whichever the shipper decides", could be heard to complain on the delivery of a carload of apples that the shipper's peach crop had been destroyed by a frost, and demand return of his money?

Conclusion.

For all of the foregoing reasons, Kasperek's action in the Western District of New York should be dismissed as lacking jurisdiction; in the alternative, Judge Curtin's decision, that Kasperek is lawfully bound by his enlistment contract, should be affirmed.

Respectfully submitted,

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RE: Richard E. Kasperek
vs
Donald Rumsfield, Sec. of Defense et al

No. 76-2090

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

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502 U.S. Court House, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

27th day of October, 19 76

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77